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June 17, 1992

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Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 2314 - (National Republican Senatorial
Committee and James L. Hagen, as Treasurer)

Dear Mr. Noble:

The purpose of this letter is to request that the Federal Election Commission take no further action in the above-captioned matter, or, in the alternative, vacate its probable cause findings and reinstate the probable cause briefing requirements of the Act.

On June 12, 1992 the United States Court of Appeals for the District of Columbia Circuit reversed the district court's ruling in FEC v. NRSC, No. 90-2055 (D.C. D.C. Apr. 9, 1991), rev'd No. 90-2055 (D.C. Cir. June 12, 1992) (hereinafter "FEC v. NRSC"). The General Counsel's Probable Cause Brief in MUR 2314 relied on the district court's ruling in FEC v. NRSC in concluding that the alleged activities violated the Act and Commission regulations. See General Counsel's Brief at 21 ("unless the decision in Common Cause v. FEC is overruled by the court's ruling in FEC v. NRSC, that case may be used as precedent on the issue of direction or control").

The Court of Appeals' decision thus casts doubt upon the validity of the legal justifications advanced by the General Counsel's Brief in recommending Probable Cause to Believe and of the Commission's March 10, 1992 findings of probable cause in MUR 2314 which presumably relied on the General Counsel's Brief. First, the Court of Appeals abrogated two factors of "direction or control," (i.e., form of checks and suggestion of specific candidates) both of which have been invoked by the General Counsel's Brief here. FEC v. NRSC, at 12-13. In so doing, the Court of Appeals implicitly rejected the General Counsel's "totality of circumstances" approach which focused on these two factors. Second, the Court of Appeals

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Lawrence M. Noble, Esq.

June 17, 1992

Page 2

emphasized the importance of actual coercion to a finding of "direction or control," id. at 13, 14, while the General Counsel's Brief in MUR 2314 concedes that contributors "consented" to earmark their contributions without any evidence of coercion. See General Counsel's Brief at 17. Third, and perhaps most significant, the Court of Appeals expressed concern over the stark "lack of precision" in defining "direction or control," especially in light of the recognized First Amendment associational interests implicated. FEC v. NRSC, at 11.

The legal issues noted above cannot be ignored by the Commission in resolving this Matter.^{1/} The Court of Appeals' ruling undermines the Commission's finding of probable cause in MUR 2314. At the very least, the Commission's probable cause finding would require an entirely new justification and rationale than that previously provided in the General Counsel's Brief.

On three previous occasions, NRSC requested that the Commission defer action in MUR 2314 pending the Court of Appeals' resolution of FEC v. NRSC in order to avoid the situation we now find ourselves in. See April 11, 1991 letter from Jan Witold Baran to Lawrence Noble; June 20, 1991 letter from Jan Witold Baran to Lawrence Noble; Respondents' Brief in MUR 2314 at 22-25 (August 16, 1991). The Commission's denial of those requests has forced my client to incur considerable expense in responding to the Commission's actions, expense which was incurred needlessly as a result of the Court of Appeals' June 12 decision.

Given this manifest unfairness and given the highly debatable nature of the alleged violations, I respectfully request that the Commission exercise its discretion and take no further action in this Matter. After five and one-half

^{1/} This letter is not intended to serve as an exhaustive discussion of the impact the Court of Appeals' decision has on the Commission's March 10, 1992 probable cause findings in MUR 2314, but simply to highlight the Court of Appeals opinion's direct relevance to issues involved in MUR 2314. By letter of May 29, 1992, NRSC previously requested copies of Commission Secretary's certifications of votes in this Matter. No response has been received as of this date.

WILEY, REIN & FIELDING

Lawrence M. Noble, Esq.

June 17, 1992

Page 3

years, no resolution of this Matter appears forthcoming, and thus no real interest can be served by several more years of briefing, litigation, and expense.

In the alternative, should the Commission decide to proceed in this Matter, NRSC respectfully requests that, in light of the Court of Appeals' new controlling precedent, the Commission vacate its March 10, 1992 probable cause findings and reinstate the briefing requirements of 11 C.F.R. § 111.16.

Sincerely,



Jan Witold Baran

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